No. 10024

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

B. R. MORRIS, doing business as L. RIFKIN & SONS,
Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

ZUCKERMAN AND STEIN,
ARTHUR EDMUND STEIN,
1017 Pacific National Building, Los Angeles,
Attorneys for Appellant.

Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

Textbooks.

No. 10024

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

B. R. Morris, doing business as L. Rifkin & Sons,

Appellant,

vs.

The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

District Court.

The entire issue presented on this appeal is whether or not the District Court had jurisdiction of the action filed herein. Hence the point of jurisdiction is more fully discussed again later in this brief. The question of jurisdiction is here presented briefly in compliance with Rule 20 of the rules of this Court.

The complaint filed in the District Court alleges a cause of action for recovery on an insurance policy against the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania. It is alleged that plaintiff is a citizen of the State of California and the defendant insurance company is a citizen of the State of Pennsylvania. It is further alleged that the matter in controversy

exceeds, exclusive of interests and costs, the sum of $3000.00. [Tr. p. 4.] The allegation concerning the citizenship of the parties is admitted in the answer of the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania. [Tr. p. 20.]

Under such facts it is claimed that the District Court had jurisdiction of the action pursuant to U. S. C. A. Title 28, Section 41, Division 1b. (*Judicial Code,* Section 24.)

Other parties are named defendants in the complaint. However, as to all other defendants, plaintiff alleges that this action is brought for and on behalf of such other defendants in that the insurance policy was issued by the defendant insurance company for the benefit of the remaining defendants. [Tr. p. 8.] Under the authorities and facts more fully discussed hereinafter, plaintiff submits that such allegations in the complaint do not interfere with the jurisdiction of the District Court.

Circuit Court.

Pursuant to motion, plaintiff's action was dismissed by the District Court on September 22, 1941, on the grounds of lack of jurisdiction in that no diversity of citizenship existed. [Tr. pp. 40-41.] Upon the hearing of this motion, plaintiff moved the Court for leave to file an amended complaint in which amended complaint only the defendant insurance company was named as a defendant and all other defendants were dropped from the action. This motion was denied at the time the order of dismissal was made. [Tr. pp. 41, 50-57.] Subsequently, on November 3, 1941, plaintiff moved to vacate the order of dismissal, to file said amended complaint, for leave to realign parties defendant as parties plaintiff, or in the alternative to dismiss as to certain defendants. This mo-

tion was denied by the District Court on November 3, 1941. [Tr. p. 58.] Under such circumstances, the judgment of dismissal and the refusal of the Court to grant plaintiff's motions constituted a final judgment in this action. Hence, plaintiff is entitled to appeal to this Court under the provisions of U. S. C. A. Title 28, Sections 225a and d (*Judicial Code,* Section 128 amended).

STATEMENT OF THE CASE.

The facts as disclosed by the pleadings and other documents on file are as follows: On August 7, 1940, plaintiff filed a complaint in the District Court against the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and against some nine other named defendants and twenty defendants sued by fictitious names. The complaint was for recovery under an insurance policy. The allegations of the complaint were briefly as follows: That plaintiff is a citizen of the State of California; that the defendant insurance company is a citizen of the State of Pennsylvania. That the matter in controversy, exclusive of interests and costs, exceeds the sum of $3000.00. That on September 14, 1939, the defendant insurance company issued to plaintiff its policy of insurance known as Furriers Customers Basic Policy, in the amount of $20,000.00 for merchandise in storage rooms and $10,000.00 for merchandise outside of storage rooms. A copy of the policy is attached to the complaint. That it was the intention of the plaintiff and defendant insurance company that said policy was to cover customers' fur garments in the possession of plaintiff; that through mistake said policy did not truly express the intention

of parties in that said policy covered only customers' furs left with plaintiff and for which plaintiff issued a receipt agreeing to effect insurance on such property; that the said policy should be reformed by eliminating the provisions requiring the issuance of a receipt by plaintiff to customers. That in any event, the defendant insurance company waived the provisions in said policy with reference to the issuance of a receipt; that on November 30, 1939, a fire occurred and fur garments belonging to customers of plaintiff and in the possession of plaintiff, to the value of $6720.00 were destroyed by said fire. That said garments belonged to the defendants other than the defendant insurance company and that said individuals are by reason thereof joined as parties defendant; that said insurance was issued for the benefit of said defendants; that this lawsuit is brought for and on behalf of said defendants; that by reason of these facts, said defendant insurance company became indebted to plaintiff in the amount of $6720.00, together with interest at seven per cent per annum from April 22, 1940. The prayer asks that the policy be amended as above provided; that plaintiff and defendant owners entitled thereto be given judgment against the defendant insurance company for the sum of $6720.00, together with interest at seven per cent per annum from April 22, 1940, and for costs. [Tr. pp. 2-19.]

The defendant insurance company filed its answer on September 10, 1940. No other defendants were ever served or appeared in the action. Thereafter, on Septem-

ber 22, 1941, the defendant insurance company moved for a dismissal of the action on the grounds that it appeared from the complaint and from certain affidavits on file pertaining to a motion for continuance that no diversity of citizenship existed between plaintiff and certain of the defendants. [Tr. pp. 36-37.] At the hearing of the motion, counsel for plaintiff moved the Court for permission to file an amended complaint. This motion of plaintiff was denied and the motion for dismissal was granted. [Tr. pp. 40-41.]

Thereafter, a formal order of dismissal was filed and docketed on September 24, 1941. [Tr. pp. 41-42.] The amended complaint sought to be filed by plaintiff differed from plaintiff's original complaint in that the only defendant named therein was the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania. All other defendants were dropped and the allegations, that the action was brought for the benefit of and on behalf of the remaining defendants, were dropped. [Tr. pp. 50-57.]

Thereafter, on November 3, 1941, plaintiff moved the Court to vacate the order of dismissal, to allow plaintiff to file said amended complaint, to allow plaintiff to dismiss as to all defendants other than the defendant insurance company, or in the alternative for the Court to realign all defendants other than the defendant insurance company as parties plaintiff. [Tr. pp. 43-44.] This motion was denied. [Tr. p. 58.]

The cause of action had previously been set for trial on April 25, 1941. On March 26, 1941, plaintiff filed a notice of motion for continuance of said trial. [Tr. p. 32.] In support of said motion, one of plaintiff's counsel filed his affidavit in which he alleges, among other things, that plaintiff had named numerous defendants other than the defendant insurance company in the within action with the thought that the customers, who had suffered the actual fire loss, would join in this action and set forth their loss in an effort to recover the same; that none of said customers have done so; that plaintiff believes that he is unable to serve said customers as defendants since to do so would create party defendants who are citizens of the same state as plaintiff; that plaintiff should not be required to proceed to trial before properly ascertaining plaintiff's actual loss or legal liability to customers so as to be able to properly introduce plaintiff's claim against defendant. Other grounds for the continuance were likewise set forth in said affidavit. [Tr. pp. 33-36.]

In defendant's motion for dismissal, the grounds given were that it appears from the complaint and the other papers and documents on file, particularly from said last mentioned affidavit, that there is no diversity of citizenship between plaintiff and the defendants and, hence, the Court is without jurisdiction. [Tr. p. 37.]

The question on this appeal then is simply whether the District Court was justified in finding that it was without jurisdiction of the controversy. It is appellant's contention that, under such circumstances, the District Court

should have allowed plaintiff to dismiss as to all defendants excepting the defendant insurance company on the grounds that said remaining defendants were either improperly joined or were not necessary parties defendant to the controversy, thereby retaining jurisdiction of the action. In the alternative, it is submitted that the District Court should have retained jurisdiction by realigning all defendants other than the defendant insurance company as parties plaintiff, since their interests, if any, were clearly disclosed to lie with plaintiff rather than with the defendant insurance company.

This appeal is both from the order of dismissal and from the denial of plaintiff's subsequent motions above set forth. The questions involved in each are substantially the same.

SPECIFICATION OF ERRORS RELIED UPON.

Point I: The Court erred in finding that it lacked jurisdiction of the action and in ordering a dismissal of the action.

Point II: The Court erred in denying appellant's motion to vacate the order of dismissal.

Point III: The Court erred in refusing to grant plaintiff leave to file an amended complaint.

Point IV: The Court erred in refusing to realign parties defendant as parties plaintiff or, in the alternative, to allow plaintiff to dismiss as to certain defendants.

ARGUMENT.

I.

The Joinder of Improper or Unnecessary Parties Defendant Will Not Defeat the Jurisdiction of the Court as Between Parties Properly Before It.

Carneal v. Banks, 10 Wheat. 181, 6 U. S. (L. ed) 297;

Walden v. Skinner, 101 U. S. 577;

Salem Trust Co. v. Mfgrs. Finance Co., 264 U. S. 182;

Bullard v. Cisco, 290 U. S. 179;

Wyoga Gas & Oil Corp. v. Schrack (D. C. Pa. 1939), 29 Fed. Supp. 582;

Holmberg v. Hannaford (D. C. Ohio, 1939), 28 Fed. Supp. 216.

The above cases clearly establish the rule set forth in the heading and hold that mere formal parties will not oust the Court of jurisdiction although they do not have the requisite citizenship, provided the real controversy is between citizens of different states. Hence, if in the present case the real controversy was between plaintiff and the defendant, The Franklin Fire Insurance Company of Philadalphia, Pennsylvania, then the rules established by the above cases would be applicable to the present case.

II.

All Defendants Except the Defendant Insurance Company Were Unnecessary Parties Defendant and the Real Controversy Is Between Plaintiff and the Defendant Insurance Company Only.

It is to be noted that the policy herein sued upon states that The Franklin Fire Insurance Company of Philadelphia, Pennsylvania,

> ". . . does insure B. R. Morris, dba Rifkin & sons hereinafter called the assured, . . . for his (their) account and for account of customers hereinafter described, . . ." [Tr. p. 10.]

The policy does not name any customers specifically and by its terms directly insures the plaintiff herein. Later in the policy, it is stated:

> "This policy insures: against all risks of loss of or damage to the insured property including the assured's legal liability therefor . . ." [Tr. p. 11.]

As disclosed by plaintiff's complaint, plaintiff was seeking recovery for the destruction by fire of the fur garments belonging to customers of plaintiff and left in the possession of plaintiff. As such, plaintiff was a bailee seeking to recover on an insurance policy for destruction of goods in his possession as a bailee. As such, plaintiff was entitled to institute the action in his own name and to be paid any recovery thereunder.

Phoenix Insurance Co. v. Erie & Western Trans. Co., 117 U. S. 312 at 324;

Connecticut Fire Ins. Co. v. Evans (C. C. A. 5th), 53 Fed. (2d) 839;

68 *A. L. R.*, p. 1344 *et seq.* and cases cited therein.

Hence, clearly here plaintiff was the proper party to recover from the defendant insurance company on the said policy of insurance. The joinder of the remaining defendants was merely for the purpose of seeking to determine their rights as against plaintiff to the proceeds of the policy and for the convenience of plaintiff in presenting his proof of loss in the action. However, they were in no sense necessary parties to the action. This clearly appears on the face of the original complaint. [Tr. p. 8.] The real controversy existed between plaintiff and the defendant insurance company. The diversity of citizenship is to be determined between plaintiff and the defendant insurance company. The Court should not have concerned itself with the remaining defendants and should have allowed plaintiff to dismiss them from the action, particularly inasmuch as they had never been served or appeared in the action.

Wyoga Gas & Oil Corp. v. Schrack, supra.

Thus where the legal right to sue is in the plaintiff, the Court will not inquire into the residence of those who may have an equitable interest in the claim since they are not necessary parties on the record.

Bonnafee v. Williams, 3 Howe. 574, 11 U. S. (L. ed.) 732.

Thus the citizenship of a trustee rather than of the beneficiaries is determinative on the question of jurisdiction.

Dodge v. Tulleys, 144 U. S. 451;

Bullard v. Cisco, 290 U. S. 174.

III.

In Any Event the Court Should Have Realigned All Defendants Other Than the Defendant Insurance Company as Parties Plaintiff.

Where a party is joined as a defendant and his real interest lies with the plaintiff it is the duty of the Court to make inquiry into the facts and to realign such defendant as a party plaintiff and to retain jurisdiction of the controversy.

> *Irwin v. Missouri Valley Bridge & Iron Co.,* 19 Fed. (2d) 300, certiorari denied 275 U. S. 540, and again denied 275 U. S. 572; *Richardson v. Blue Grass Mining Co.,* D. C. Ky. 1939, 29 Fed. Supp. 658; *Hughes Federal Practice,* section 746; *Hamer v. New York Rys. Co.,* 244 U. S. 266; *City of Indianapolis v. Chase National Bank,* 86 L. Ed. 27 (Oct. 1941).

It should be noted that under Section 19(a) of the new rules of Civil Procedure for the District Courts of the United States, where a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff. It is submitted that, as shown above, said remaining defendants were not necessary parties to the action and, hence, should have been dismissed, disregarded or realigned. However, if said parties were necessary parties, plaintiff should have been allowed to avail himself of the provisions of Rule 19(a) and make involuntary plaintiffs out of said defendants. The facts of the present case would seem to clearly bring it within said rule.

CONCLUSION.

Hence, it is submitted that no matter how considered, the District Court had and should have retained jurisdiction of the controversy in this action, and its dismissal of the same for lack of jurisdiction was error.

Respectfully submitted,

ZUCKERMAN AND STEIN,
ARTHUR EDMUND STEIN,
By ARTHUR EDMUND STEIN,
Attorneys for Appellant.